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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 36.

ALLEGHANY CORPORATION, *et al.*,

Appellants,

v.

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

No. 114.

INTERSTATE COMMERCE COMMISSION,

Appellant,

v.

BRESWICK & Co., *et al.*,

Appellees.

SUPPLEMENTAL BRIEF.

The two I. C. C. cases cited for the first time to the Court in the closing statement of Alleghany counsel, to which appellees had no opportunity to reply, uphold the contentions in Point IV of appellees' brief.

Alleghany apparently relies on the following language:

"Lessor railroad companies are carriers within the meaning of Section 5(2), *Milwaukee Livestock Han-*

dling Co. Control, 257 I. C. C. 796, 799. Section 5(2) is applicable, in terms, to purchase by any carrier of the properties, or any part thereof, of another." *Gulf, M & O R. Co. Purchase*, 261 I. C. C. 623, at 625.

In the *Gulf* case there was a purchase by *a carrier* of the properties of a terminal company that had previously been a lessor, a factual situation wholly different from the case at bar.

Turning to the *Milwaukee* case, the above holding is immediately made clear. There applicant applied for approval of acquisition of stock ownership of livestock handling companies and the acquisition by purchase or otherwise of the railroad properties used by those companies but owned by certain lessor companies.

> "At this time the applicant is a holding company. * * * its only present relationship to transportation subject to the act is control of subsidiaries which are themselves carriers or which control, in turn, companies that are carriers subject to the act." 257 I. C. C. at 797.
>
> * * * * * *
>
> " * * * The Commission first found the San Francisco Company to be a common carrier by railroad subject to the act (245 I. C. C. 241), but later found it not to be such a carrier (251 I. C. C. 677), accordingly as it was actually engaged in the performance of transportation service, or had divested itself of such performance by leasing its loading and unloading facilities to its subsidiary handling company; and, for the same reasons, found the Fort Worth lessee to be a carrier, but the *(lessor)* Fort Worth Company not to be a carrier (245 I. C. C. 241); all subject to reopening of the proceeding for the purpose of ascertaining the conditions then existing, and entering such orders as may be justified, if

lessor stockyards companies should undertake to resume operation of their loading and unloading facilities and to perform the loading and unloading services." 257 I. C. C. at 798-9 (italicized matter supplied).

• • • • • •

"We have held uniformly that lessor railroad corporations are subject to our jurisdiction in proceedings involving acquisitions of lines of railroad, *Cleveland & P. R. Co. Purchase,* 244 I. C. C. 793.

"Thus the lessor stockyards companies must be regarded as carriers within the meaning of Section 5. With acquisition of the railroad property of any one of these companies subject to the lease thereof, the applicant will be substituted as lessor and so will itself become such a carrier. It follows that acquisition by the applicant of the railroad properties of the stockyards companies, or lessors, is a transaction within the scope of section 5(2) of the act.

• • • • • •

"In the instant case, the situation is changed somewhat because the applicant is acquiring, not only direct control of three carriers, but also railroad properties subject to lease thereof to these carriers for operation. On acquiring these properties subject to lease, the applicant will be the lessor of such railroad properties and, by operation of law, will become subject to section 20 insofar as it requires certain reports from lessors. See section 20(8). In *United Stockyards Corp. Proposed Bonds,* 257 I. C. C. 831, Finance Docket No. 14691, decided concurrently herewith, we are, for the reasons stated in that report, declining jurisdiction of the applicant under Section 20a. So long, therefore, as the applicant does not actually operate its railroad properties, no inclusion of the character contemplated by Sec-

tion 5(3) is necessary in our order herein. * * *" *Milwaukee Livestock Handling Co. et al. Control, etc.*, 257 I. C. C. 796, 799-800.

The I. C. C. found in the Boston & Albany proceeding that "The proposals will not affect existing transportation service to the public" (Report of I. C. C., R. 451), and "no material change in operation is involved" (R. 469).* All that is occurring is "The issue of bonds by Central to the stockholders of the lessor companies in exchange for their shares of capital stock" (R. 455). All of the transportation properties of the Boston & Albany, Pittsfield, and Ware Companies have been leased to Central since November 15, 1899, November 25, 1876, and January 1, 1874 respectively for 99 to 999 years (R. 454).

In the language of the *Milwaukee* case, *supra*, no "acquisitions of lines of railroad" or "of the railroad property of any one of these companies subject to the lease" was sought or authorized. All that was acquired was stock in each case in a lessor not "engaged in the performance of transportation service" that "had divested itself of such performance by leasing" and thus was "not to be (considered) a carrier" unless the "lessor * * * companies should undertake to resume operation." Since no resumption of opera-

* The District Court's findings are at R. 675-678.

tion is sought or authorized, the companies herein are not "carriers."*

January 28, 1957.

Respectfully submitted,

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---

* Similarly, in the Bridge Company proceeding, by the rule of the above cases, the "merger" and "modification" of the lease did not result in making the "lessor" Big Four a "carrier". Neither before nor after the Bridge Company merger was it "actually engaged in the performance of transportation service", since in either case it "had divested itself of such performance by leasing" 100% of the Bridge Company's stock or 100% of its properties. And the Central thus acquired in fact and substance no control of any railroad line or properties that it had not previously acquired in the lease prior thereto. Nor did Alleghany, assuming *arguendo*, it had previously acquired control of Central in fact and law, "acquire" thereby "control" of any "carrier."

The pertinent I. C. C. findings are set forth in appellees' brief at pages 84-85. These show merely a change "in the res of the lease" and no resumption of the Bridge Company's operation by the Big Four.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~932~~ 82

BAKER, WEEKS & CO., OSCAR GRUSS & SON, IRVING NEUMAN, as trustee under a deed of trust dated November 6, 1943, and EDWARD GORNISH,

Appellants,

vs.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. .

BAKER, WEEKS & CO., OSCAR GRUSS & SON, IRVING NEUMAN, as trustee under a deed of trust dated November 6, 1943, and EDWARD GORNISH,

Appellants,

vs.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

This jurisdictional statement is filed pursuant to paragraph 2 of Rule 13, and in compliance therewith and with Rule 15.

THE OPINIONS AND THE JUDGMENT BELOW, AND OTHER RELEVANT OPINIONS.

A. The opinion of the United States District Court for the Southern District of New York, which was delivered on November 18, 1955 after final hearing and before entry of the judgment appealed from, is reported at 138 F. Supp.

123. Copies of two supplemental opinions, respectively delivered on December 23, 1955 and January 27, 1956, are appended and respectively marked Appendix A and Appendix B. Neither of these supplemental opinions has been reported.

B. Two memorandum opinions constituting orders, both delivered on January 27, 1956, the first of which denied a motion by the appellants for reargument, and the second of which denied a motion by Alleghany Corporation (Alleghany), an intervening defendant below, to set aside the judgment appealed from and for a new trial, are included as addenda to the final opinion reported at 138 F. Supp. 123 and appear at 138 F. Supp. 138-140.

C. The earlier majority opinion, delivered on July 21, 1955 and granting an interlocutory injunction, is reported at 134 F. Supp. 132; and the dissenting opinion of Hincks, C. J., also delivered on July 21, 1955, is reported at 134 F. Supp. 149. Copies of the earlier and unreported opinions of Hincks, C. J. and Dimock, J., both delivered on July 26, 1955 and relating to Alleghany's application below for *supersedeas* pending appeal from the interlocutory injunction, are appended and respectively marked as Appendix C and Appendix D.

D. Reference to the following reported opinions is necessary to ascertain the grounds of the judgment appealed from:

(1) the opinion of Walsh, J. in an action in said District Court entitled "*Breswick & Co. and Myron Neisloss, etc., Plaintiffs*, v. *O. Henry Briggs, et al., Defendants*," delivered on April 6, 1955 and reported at 130 F. Supp. 953; and

(2) the opinion of Mr. Justice Harlan, delivered on August 3, 1955 and reported at 100 L. Ed. 36, which in part granted and in part denied Alleghany's application to this Court for *supersedeas* pending appeal from the interlocutory injunction.

E. A copy of the judgment appealed from, dated December 23, 1955, is appended and marked Appendix E. A copy of portions of the interlocutory injunction dated July 26, 1955, to which reference is necessary to ascertain the grounds of the judgment appealed from, is appended and marked Appendix F.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Suit was brought under 28 USC §§1336, 1398, 2284 and 2321-2325 (the Urgent Deficiencies Act): to enjoin, set aside, annul and void the two status orders mentioned in subparagraph (1) of the next paragraph, insofar as they determined Alleghany's status under the Interstate Commerce Act and subjected it continued regulation thereunder; to enjoin, set aside, annul and void the two preferred stock orders mentioned in subparagraph (2) of the next paragraph; and to restrain Alleghany from action respecting the issuance, distribution or transfer of the 6% convertible preferred stock authorized by such preferred stock orders.

The judgment appealed from:

(1) enjoined, set aside, annulled and voided two orders of the Interstate Commerce Commission (ICC), respectively dated March 2, 1955 and May 24, 1955 and entered in Finance Dockets Nos. 14692 and 18656 (the status orders), to the extent *inter alia* that said orders asserted ICC jurisdiction over Alleghany and subjected it to regulation under the Interstate Commerce Act;

(2) enjoined, set aside, annulled and suspended two ICC orders, respectively dated May 26, 1955 and June 22, 1955 and entered in Finance Docket No. 18866 (the preferred stock orders), which authorized Alleghany to issue (a) not exceeding 1,367,440 shares of $10 par value 6% convertible preferred stock (New Preferred Stock) in exchange for its existing $100 par value cumulative 5½% preferred stock (Old Preferred Stock), on the basis of 10 shares of New Preferred Stock for each share of Old Preferred Stock, and (b) not exceeding 14,768,352 additional shares of $1.00 par value common stock, upon conversion of New Preferred Stock; and

(3) enjoined Alleghany and its agents from taking any steps in connection with or in furtherance of the issuance of New Preferred Stock in exchange for Old Preferred Stock, or for any other purpose, or the transfer thereof.

The judgment sought to be reviewed was dated and entered on December 23, 1955. Motions for rehearing and reargument were denied by memorandum opinions constituting orders dated and entered on January 27, 1956. Appellants filed their notice of appeal on February 23, 1956 in the office of the Clerk of the United States District Court for the Southern District of New York.

Jurisdiction of this appeal is conferred by 28 USC §§1253 and 2101(b). Many cases sustain the jurisdiction of this Court, including:

Baltimore & Ohio Railroad Co. v. *U. S.*, 264 U. S. 258; *U. S.* v. *Lowden*, 308 U. S. 225; *U S.* v. *Marshall Transport Co.*, 322 U. S. 31.

THE QUESTIONS PRESENTED BY THIS APPEAL.

The following questions are presented by this appeal:

1. Did the District Court err in holding that the status orders and the preferred stock orders are reviewable in an action under the Urgent Deficiencies Act?

2. Did the District Court err:

(a) in asserting and exercising the power to determine Alleghany's status under the Investment Company Act of 1940, in this action under the Urgent Deficiencies Act to review ICC orders based on the Interstate Commerce Act;

(b) in holding that the appellees had standing to sue on the basis of their claimed independent rights under the Investment Company Act, as common stockholders of Alleghany; and

(c) in asserting and exercising the power to determine and enforce the appellees' claimed independent rights under the Investment Company Act, by enjoining the issuance and transfer of New Preferred Stock?

3. Did the District Court err in holding:

(a) that an ICC order dated June 5, 1945, which assumed jurisdiction over Alleghany pursuant to Section 5(3) of the Interstate Commerce Act [49 USC §5(3)] upon the basis of Alleghany's then control of a carrier parent other than the intervening defendant below The New York Central Railroad Company (Central), automatically lost its efficacy when Alleghany divested itself of such control on January 19, 1954, and that the ICC thus automatically lost jurisdiction over Alleghany on January 19, 1954, although by its terms said order remained in full force and effect unless

and until the ICC ordered otherwise, and although the ICC did not order otherwise until it made the superseding status orders;

(b) that an order of the Securities and Exchange Commission (SEC) dated October 4, 1945, which terminated Alleghany's registration under the Investment Company Act and exempted it from regulation thereunder upon the basis of its regulation under the Interstate Commerce Act pursuant to said ICC order dated June 5, 1945, also automatically lost its efficacy when Alleghany divested itself of such control on January 19, 1954, and that Alleghany automatically lost such exemption on January 19, 1954, although said SEC order expressly provided for its revocation, suspension or modification after appropriate notice and opportunity for hearing, although the SEC had not held any hearing and had not made any order respecting such revocation, suspension or modification, and although, in the proceedings which resulted in the status orders and otherwise, the SEC recognized the continuing validity of said ICC order dated June 5, 1945 and the ICC's resultant continuing jurisdiction over Alleghany; and

(c) that Alleghany thus automatically became an unregistered investment company on January 19, 1954, thereafter and still subject to the provisions of the Investment Company Act relating to an unregistered investment company?

4. Did the District Court err in refusing to hold:

(a) that Alleghany's registration automatically revived and Alleghany automatically reverted on January 19, 1954 to its former status as a registered closed-end, non-diversified, management investment company; and

(b) that, as such a registered investment company, it was lawful for Alleghany to issue New Preferred Stock in

exchange for Old Preferred Stock without prior SEC approval; or

(c) that the SEC has primary jurisdiction to determine whether Alleghany became a registered or an unregistered investment company on January 19, 1954, and whether it is lawful for Alleghany to issue New Preferred Stock in exchange for Old Preferred Stock without prior SEC approval?

5. Did the District Court err in holding that the portions of the superseding status orders which terminated said ICC order dated June 5, 1945 are effective, although those portions are included in the portions of the status orders which it enjoined, set aside, annulled and voided?

6. Did the District Court err in holding:

(a) that, if Alleghany controls Central, a carrier parent which controls numerous carrier subsidiaries, its acquisition of such control constituted a non-carrier acquisition of control of two or more carriers, subject to ICC approval and authorization under Section 5(2) of the Interstate Commerce Act [49 USC §5(2)];

(b) that, if Alleghany controls Central, the transaction approved and authorized by the status orders under said Section 5(2), which involved a merger of the properties of one Central subsidiary into another and a lease by the latter to Central of the properties so merged, did not constitute a non-carrier acquisition of control by Alleghany of the properties so merged and leased, within the meaning of said Section 5(2) and subject to ICC approval and authorization thereunder;

(c) that the ICC's determination, that said transaction constituted such a non-carrier acquisition of control by

Alleghany and that Alleghany was a necessary party to the application for approval and authorization thereof under said Section 5(2), was irrational;

(d) that the ICC has been inconsistent in its determinations respecting such merger or lease transactions, as acquisitions of control within the meaning of said Section 5(2) and subject to ICC approval and authorization thereunder; and

(e) that such inconsistency deprived its determination in this case of substantial weight before the District Court?

7. Did the District Court err in refusing to hold:

(a) that, if Alleghany controls Central and if its acquisition of such control was subject to ICC approval and authorization under said Section 5(2), such acquisition constituted a violation of Section 5(4) of the Interstate Commerce Act [49 USC §5(4)];

(b) that Alleghany is subject to ICC regulation in respect of such violation under Sections 5(7), 5(8) and 5(9) of the Interstate Commerce Act [49 USC §§5(7), 5(8) and 5(9)], regardless of the validity of the status orders; and

(c) that, if Alleghany controls Central, it is subject to regulation by the ICC under Section 12(1) of the Interstate Commerce Act [49 USC §12(1)], whether or not its acquisition of such control was lawful, and regardless of the validity of the status orders?

8. Did the District Court err:

(a) in holding that the ICC lacks jurisdiction to determine whether Alleghany controls Central and whether its acquisition of such control is consistent with the public interest, in the absence of an application by Alleghany for

ICC approval and authorization of its acquisition of such control pursuant to said Section 5(2); and

(b) in refusing, for that reason, to remand the case to the ICC with appropriate instructions regarding the determination of those questions?

9. Did the District Court err in holding:

(a) that the appellees were entitled to an evidentiary hearing before the ICC on the issues of Alleghany's status under the Investment Company Act and the alleged conspiracy of Alleghany and others to avoid registration, regulation and liability thereunder; and

(b) that the appellees were entitled to an evidentiary hearing before the ICC on the issue of Alleghany's actual control of Central, although they failed to deny Alleghany's allegations respecting its ownership of shares of Central's stock and its right to vote additional shares of Central's stock, and although such allegations showed that Alleghany had acquired the power to exercise control over Central?

10. Did the District Court err in dismissing the defenses alleged in the appellants' answers?

11. Did the District Court err in enjoining, setting aside, annulling and voiding the status orders, in so far as they related to Alleghany?

12. Did the District Court err in enjoining, setting aside, annulling and suspending the preferred stock orders?

STATEMENT OF THE CASE.

The principal facts of the case, including its administrative and legal history, are summarized below.

A. Alleghany's registration in 1940 under the Investment Company Act, its acquisition by 1943 of control of Chesapeake, the Marshall Transport decision in 1944, the ICC order dated June 5, 1945, and the SEC order dated October 4, 1945:

On November 1, 1940 Alleghany registered with the SEC under the Investment Company Act as a closed-end, non-diversified, management investment company.[1]

By April 1942 Alleghany had acquired control, through stock ownership, of Chesapeake & Ohio Railway Company (Chesapeake) and its carrier subsidiaries and affiliates comprising the Chesapeake System.[2] It had acquired such control *without prior ICC approval and authorization under Section 5(2)*[3]; and the ICC's subsequent objection to its acquisition of such control was based on its continuing control of carriers outside the Chesapeake System.[4]

In April 1944 this Court decided *U. S.* v. *Marshall Transport Co.*, 322 U. S. 31, holding: that a proposed purchase of the properties of an independent carrier by a carrier subsidiary of a non-carrier parent would constitute an acquisition of control of such properties by the non-carrier

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[1] *In Re Alleghany Corporation*, 20 SEC 731, 732.

[2] *Chesapeake & Ohio Railway Company Purchase*, 261 ICC 239, 252.

[3] Section references not otherwise identified are to sections of the Interstate Commerce Act.

[4] The ICC instituted proceedings, based on alleged resultant violations of Section 5(4), which were terminated by the voting trust agreements approved in the *Chesapeake Purchase Case*, 261 ICC 239, 240-245, 261-262.

parent under Section 5(2)(a)(i); that the non-carrier parent was therefore a necessary party to an application for ICC approval and authorization of the purchase under Section 5(2)(b); and that, as such a necessary party, the non-carrier parent would subject itself to ICC jurisdiction and regulation pursuant to Section 5(3).

On September 2, 1944 Chesapeake filed an application with the ICC under Section 5(2) for approval and authorization of its purchase of the properties of Norfolk Terminal & Transportation Company (Terminal Company), a wholly-owned Chesapeake subsidiary. The proceeding on this application was assigned to Finance Docket No. 14692. On September 4, 1944 Alleghany, Chesapeake's non-carrier parent, filed a supplemental application under Section 5(2), which joined in Chesapeake's application and sought approval and authorization of Alleghany's acquisition of control of Terminal's properties through Chesapeake's purchase. The supplemental application stated that it was made in compliance with the decision in *Marshall Transport*.[5]

The ICC granted the applications and, in doing so, found and concluded, in substance and effect and either expressly or by necessary implication: that the purchase would effect "a change of (Chesapeake's direct and Alleghany's indirect) control" of Terminal's properties; that the changed control of those intra-system properties constituted a non-carrier acquisition of control by Alleghany under Section 5(2)(a)(i); that Alleghany was a necessary party under Section 5(2)(b); that the ICC had jurisdiction over the

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[5] *Chesapeake Purchase Case*, 261 ICC 239, 244-5, footnote 2. The supplemental application also asked the ICC to approve and authorize *continuance* of Alleghany's control of Chesapeake and its carrier subsidiaries and affiliates. The report and decision in the *Chesapeake Purchase Case* indicates that Alleghany did not ask for retroactive approval and authorization of its prior acquisition of control.

transaction and the parties, including Alleghany, whether or not Alleghany had lawfully acquired control of Chesapeake; and that a determination of the latter question was unnecessary "in taking (such) jurisdiction."[6]

Accordingly, on June 5, 1945 the ICC issued an order under Section 5(2) and pursuant to Section 5(3) which *inter alia* subjected Alleghany to ICC regulation under Sections 20(1)-(10) and 20a(2)-11 "*unless and until otherwise ordered by this Commission.*"[7]

The ICC did not order otherwise until it made the superseding status orders which were enjoined and annulled below.

Having been thus subjected to regulation under the Interstate Commerce Act, Alleghany applied to the SEC for an order pursuant to Section 8(f) of the Investment Company Act [15 USC §80a-8(f)] on the ground that, by definition in Section 3(c)(9) of the latter Act [15 USC §80a-3(c)(9)], such ICC regulation excluded it as an investment company thereunder. The SEC made an independent determination that, by virtue of the ICC order dated June 5, 1945, Alleghany was "subject to regulation under the Interstate Commerce Act" within the meaning of said Section 3(c)(9);[8] and, on October 4, 1945, it made an order declaring that Alleghany had ceased to be an investment company within the meaning of the Investment Company Act, and ordering that Alleghany's registration

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[6] 261 ICC 239, 260. This portion of the *Chesapeake Purchase Case* decision should be compared with the District Court's comment thereon at 138 F. Supp. 123, 133-134.

[7] *In Re Alleghany Corporation*, 20 SEC 731, 733-734. Emphasis in this Statement is supplied.

[8] *In Re Alleghany Corporation*, 20 SEC 731, 733-736.
The SEC also determined that, "by virtue of its control of Chesapeake and its subsidiaries," Alleghany was also subject to regulation under Section 12 (1) (*id.* p. 735); *and ICC jurisdiction under that section does not depend on an order under Sections 5(2) and 5(3).*

thereunder "shall forthwith cease to be in effect, *provided, however,* that if in the future Alleghany Corporation ceases to be subject to regulation under the Interstate Commerce Act as set forth in such (SEC) Findings and Opinion, *this order may be revoked, suspended or modified after appropriate notice and opportunity for hearing.*"[9]

The SEC has not held any hearing and has not made any order respecting such revocation, suspension or modification.

B. Alleghany's divestment of its control of Chesapeake, its acquisition of control of Central, and the related administrative proceedings and actions which preceded the merger and lease application:

On January 19, 1954 Alleghany sold its Chesapeake stock, to enable it to execute its announced intention to gain control of Central without violating Section 5(4), and began the famous and successful proxy fight for such control.[10]

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[9] The District Court regarded this order (and the careful, independent determination on which it was based) as merely perfunctory, ministerial acts without legal significance—"but a formal recognition" of Alleghany's already existing "exemption" in automatic consequence of the ICC order dated June 5, 1945 (138 F. Supp. 123, 129).

Thus, according to the District Court, Alleghany's registration ceased to be in effect on June 5, 1945, regardless of the provisions of Section 8(f) of the Investment Company Act. But if the District Court's theory of automatic transfer of administrative jurisdiction and automatic impotence of administrative orders is valid, Alleghany's registration ceased to be in effect prior to June 5, 1945 for at least two reasons: (1) because Alleghany became subject to ICC regulation under Section 12(1) the moment it acquired control of Chesapeake; and (2) because Alleghany had already been subjected to affirmative ICC regulation under Sections 5(4)—5(7) in the proceedings mentioned in footnote 4, *supra,* p. 10.

[10] By May 21, 1954 Alleghany completed the liquidation of voting stock of another carrier, which had been deposited with a voting trustee pursuant to the order dated June 5, 1945. See: 138 F. Supp. 123, 129 and footnote 7a.

At the annual meeting of Central's stockholders, which began on May 26, 1954, they elected the entire slate of directors advocated by Alleghany, including Robert R. Young (the Chairman of Alleghany's Board of Directors), Allan P. Kirby (the President and a director of Alleghany) and Thomas J. Deegan, Jr. (a Vice-President and a director of Alleghany). Robert R. Young was elected Chairman at the first meeting of Central's new Board of Directors.[11]

The uncontradicted evidence before the ICC, in the proceedings which resulted in the status orders, showed: that, at December 31, 1954, Alleghany owned 586,000 shares (directly and indirectly) or approximately 9% of all the outstanding shares of Central stock, and had the right to vote 886,000 shares or approximately 14% of all the outstanding shares; and that, on September 17, 1954, the number of Central's stockholders was 41,606.[12]

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During the course of the proxy fight three proceedings were instituted before the ICC, the nature and disposition of which bear on two of the questions presented by this appeal:[13]

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[11] The appellants contend that such partial interlocking, including a common Chairman, constitutes or sustains the ICC finding of actual control, within the meaning of Section 1(3)(b), regardless of Alleghany's relationship to the other Central directors.

[12] The appellants also contend that these admitted facts constitute conclusive evidence that Alleghany acquired control of Central within the meaning of Section 1(3)(b), regardless of any question of actual control; for the definition of "control" in that section, which applies to Section 5, includes "the power to exercise control".

[13] The nature, course and disposition of these proceedings is more fully recited in the Report of Division 4 dated March 2, 1955, in the proceedings which resulted in the status orders. This Report is printed as Document 7 at pp. 55-88 of the Separate Appendix to the Jurisdictional Statement filed with this Court by Alleghany. The relevant portion appears in the section entitled *"Prior Proceedings related hereto"* at pp. 61-65.

In March 1954 Central requested the ICC, on its own motion, to investigate the transactions of Alleghany and Chesapeake to determine, among other things, whether Alleghany continued to control Chesapeake despite its claimed divestment of such control. The ICC denied this request for lack of sufficient grounds developed by its own inquiries, but expressly stated that the denial did not constitute a determination of the question thus raised.[14]

In April 1954 Central petitioned for a declaratory order to the effect that Alleghany's acquisition of control of Central would constitute a non-carrier acquisition of control of two or more carriers within the meaning of Section 5(2). In May 1954 the ICC denied this petition as a matter of discretion.

In May 1954 a bondholder's protective committee filed a complaint under Section 5(7) which again raised the issue of Alleghany's continuing control of Chesapeake. In August 1954 the complainants petitioned for leave to withdraw the complaint, which was accordingly dismissed without any determination on the merits.[14]

. . . . . .

Following Alleghany's divestment of control of Chesapeake and the successful conclusion of the Central proxy fight, administrative actions were taken (by the ICC respecting its order dated June 5, 1945, and by the SEC respecting its order dated October 4, 1945) the nature and disposition of which have special significance in this case:

On June 22, 1954 the ICC ordered Alleghany to show cause on or before July 15, 1954 why its order dated June

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[14] A similar question was raised by interveners associated with the appellees in the proceedings which resulted in the status orders. The significance of this unresolved question, in relation to the District Court's theory of automatic transfer of administrative jurisdiction and automatic impotence of administrative orders, is obvious. If the theory is correct, and a future determination is made that Alleghany still controls Chesapeake, the result in case of intervening SEC regulation would be chaos beyond imagination.

5, 1945 should not be terminated, insofar as it related to Alleghany's status and regulation as a carrier under the Interstate Commerce Act. On July 23, 1954 the ICC postponed action on the order to show cause to permit the filing of the merger and lease application which resulted in the superseding status orders.[15]

On July 7, 1954 the SEC ordered a hearing on July 27, 1954 to determine whether its order dated October 4, 1945 should be revoked, suspended or modified. On October 15, 1954, after several prior adjournments to fixed dates, Alleghany and the SEC entered into a written stipulation of further adjournment without date. The stipulation contained a provision respecting Alleghany's relationship to the SEC, conditioned upon ICC revocation, modification or suspension of the order dated June 5, 1945

> *"so as to relieve Alleghany from the necessity of compliance with Sections 20(1) to (10) and 20a(2) to (11) of the Interstate Commerce Act, as provided in said order of June 5, 1945. . . ."*

On October 18, 1954 the SEC issued an order, based on and conformable to the stipulation, which stated the SEC's opinion that it "may be appropriately granted *in the public interest and the interest of investors.*"

C. The merger and lease application (Finance Dockets Nos. 14692 and 18656):

On September 20, 1954 the merger and lease application which resulted in the status orders was filed by Alleghany, Central, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (Big Four) and Louisville & Jeffersonville Bridge and Railroad Company (Bridge Company).[16]

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[15] For a fuller recital, see Alleghany's Separate Appendix, Document 7, pp. 64-65.

[16] The merger and lease application is dated September 17, 1954.

The application showed that Central controlled the Big Four through ownership of a large majority of its stock and under a lease of its properties, and that all of the Bridge Company's stock was owned by the Big Four and held by Central under the lease.[17]

The application sought an order under Section 5(2) approving and authorizing: a merger of the Bridge Company's properties into the Big Four; a lease of the properties so merged, by the Big Four to Central; and the resultant acquisition of control of the properties so merged and leased, by Central and, through Central, by Alleghany. The application pointed out the parallel between Alleghany's existing relationship to Central and its subsidiaries and its relationship on June 5, 1945 and thereafter to Chesapeake and its subsidiaries, stated Alleghany's intention to increase its holdings of Central stock, referred to Alleghany's program of rehabilitation of the Central System and simplification of its internal structure, and requested an order "containing the condition that Alleghany shall continue to be considered a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Act, as provided by Section 5(3) thereof."

As to Alleghany's control of Central, the application alleged: that Alleghany had "recently acquired control of the Central as the result of a proxy contest in which the slate of directors nominated by Alleghany was elected as the Central's Board of Directors"; that, in respect of the

[17] The District Court erroneously referred to and decided this case as one "Where there is already *complete* stock control of the components of a system" and "which only involves *wholly* owned subsidiaries of a single holding company" (138 F. Supp. 123, 135). The merger and lease application showed, and it was not disputed, that Central owned 98.98% of the Big Four's common stock and 86.45% of its preferred stock. Since the Big Four was not a wholly owned subsidiary of Central, neither was the Bridge Company, which was wholly owned only by the Big Four.

6,447,410 outstanding shares of Central's common stock, Alleghany owned 15,500 shares directly and an undivided one-half interest in 600,000 shares, and was entitled to vote 615,500 shares or almost 10%; that Alleghany's Chairman and President were the respective beneficial owners of 100,200 and 300,100 shares of Central stock; that Central had 41,606 stockholders; and that Alleghany and Central had three common directors, of whom one was a common Chairman and the other two were also the President and a Vice-President of Alleghany.

On December 31, 1954 Alleghany filed a supplemental pleading which showed that it then owned 286,000 shares directly and an undivided one-half interest in 600,000 shares, and was entitled to vote 886,000 shares or approximately 14% of Central's outstanding common stock.

Of the foregoing allegations respecting Alleghany's control of Central, the appellees specifically denied only one before the ICC: the allegation that Alleghany had acquired complete actual control by nominating all the directors who were subsequently elected.

D. The Exchange Offer and the New Preferred Stock application (Finance Docket No. 18866):

When Messrs. Young and Kirby undertook to manage Alleghany in 1937, its capital structure was burdened by a staggering load of funded debt, preferred stocks and dividend arrearages. Voluntary recapitalization was a long and difficult process. It involved *inter alia* retirement and redemption of the funded debt, reduction in the size of the preferred stock issues by various means and in successive stages, and elimination of dividend arrearages; and its completion was a condition precedent to resumption of dividends on the common stock.[18]

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[18] Some of the early steps in this process are favorably mentioned in the *Chesapeake Purchase Case*, 261 ICC 239, 246-7.

By February 1955 the remaining and culminating step in this process was the voluntary recapitalization of 136,744 shares of Old Preferred Stock, on which dividend arrearages then aggregated $132 per share. To persuade the holders of Old Preferred Stock to surrender these large preferred claims, it was obviously necessary to offer them compensating inducement.

The problem thus posed was solved by an ingenious offer (Exchange Offer) to exchange, for each share of Old Preferred Stock, 10 shares of New Preferred Stock, redeemable on and after May 1, 1970, and convertible prior to redemption into common stock at a rate to be determined at the expiration of the Exchange Offer in accordance with a prescribed formula and upon payment to Alleghany of $3.75 for each share of common stock issued for such conversion.

Related charter amendments were adopted by a large majority of each class of stockholders entitled to vote thereon, at a special meeting held on February 8, 1955; and the Exchange Offer was made on February 10, 1955.[19]

In view of the provisions of the ICC order dated June 5, 1945, the Exchange Offer was conditioned upon ICC authorization and approval under Section 20a by appropriate order not later than May 31, 1955; and on February 18, 1955 Alleghany filed an application for such an order.

Before the Exchange Offer expired on May 31, 1955 it was accepted by the holders of approximately 132,000 shares of Old Preferred Stock, including the appellants.[20] Under the prescribed formula for its determination, the conver-

[19] Alleghany's proxy material, relating to the charter amendments and the Exchange Offer, was duly submitted to the SEC and thereafter distributed without SEC objection. Later, the Exchange Offer was similarly submitted and distributed.

[20] The Exchange Offer was accepted by the appellants and persons they represent, in respect of 5,715 shares of Old Preferred Stock.

sion rate for each share of New Preferred Stock deliverable in exchange was fixed on May 31, 1955 at 4.7 shares of common stock.

Since redemption of the relatively few remaining shares of Old Preferred Stock was feasible, consummation of the Exchange Offer meant the elimination of all the Old Preferred Stock (including dividend arrearages aggregating approximately $18,000,000), the substitution of approximately 1,320,000 shares of New Preferred Stock on a current basis, and the probable resumption of dividends on the common stock. And future conversion of the New Preferred Stock would swell Alleghany's capital at the rate of $17.625 per share—a potential aggregate capital increase of approximately $23,000,000.

E. *Brewick & Co.* v. *Briggs*, and the decisions therein reported at 130 F. Supp. 953 and 135 F. Supp. 397:

In February 1955 two of the appellees (Breswick & Co. and Neisloss) brought a derivative action in the right of Alleghany against its directors and others in the district court below. The relevant counts of the complaint in that action rest on the theory: that Alleghany became an investment company subject to the Investment Company Act, upon its divestment of control over Chesapeake on January 19, 1954; and that the individual defendants are liable in respect of certain later transactions which, except for that Act, were otherwise lawful.[21]

The fifth count alleges that the merger and lease application was filed pursuant to a conspiracy by Alleghany and the individual defendants to avoid registration, regulation and liability under the Investment Company Act.

* * * * * *

Shortly after the New Preferred Stock application was filed, the plaintiffs in *Breswick & Co.* v. *Briggs* moved to

[21] These transactions, and the related causes of action, are discussed in *Breswick & Co.* v. *Briggs*, 135 F. Supp. 397.

enjoin Alleghany from proceeding in respect thereof before the ICC, "Upon the claim that Alleghany Corporation is an investment company subject to regulation by the Securities and Exchange Commission, rather than a carrier subject to regulation by the Interstate Commerce Commission."[22] Like the identical later claim of the appellees here, this claim was based on the proposition that the ICC order dated June 5, 1945 lapsed on January 19, 1954 when Alleghany relinquished control of Chesapeake.

On April 6, 1955 the district court denied the motion and relegated the plaintiffs "to the exhaustion of their remedies before the ICC and before the court having jurisdiction to review the determination of that agency."[23] Thus the district court necessarily decided that the ICC had power to determine the plaintiffs' claim regarding Alleghany's status under the Investment Company Act; and it also decided, in the quoted excerpt and elsewhere in its opinion, that the plaintiffs would have standing to seek a judicial determination of that claim in an action under the Urgent Deficiencies Act to review the ICC determination thereof. Indeed, the majority opinion which granted the interlocutory injunction below held that the status orders were reviewable because they "granted (Alleghany) an exemption from the terms of the Investment Company Act", and that, in an action to review those orders, the court had power to determine and enforce the

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[22] *Breswick & Co.* v. *Briggs*, 130 F. Supp. 953, 954.

[23] *Ibid.* As authority for this ruling, the district court cited *Meyers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, and *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540. But in each of those cases the plaintiff sued an administrative agency and sought to enjoin administrative action. The reason for relegating the plaintiff in such a case to exhaustion of his administrative remedies, and to judicial review under the Urgent Deficiencies Act of adverse administrative action, did not exist in *Breswick & Co.* v. *Briggs;* for the ICC was not a party there and the plaintiffs sought no relief against it.

appellees' claim regarding Alleghany's status under that Act.[24]

The appellants contend that the motion for an injunction in *Breswick & Co.* v. *Briggs* was denied on erroneous grounds,[25] which led to serious error below respecting the scope of judicial power in an action under the Urgent Deficiencies Act, the appellees' standing to sue, the adequacy of their remedy by plenary suit, their right to enforce the Investment Company Act in an action to review orders based on the Interstate Commerce Act, and, indeed, their right to enforce the Investment Company Act by injunction in any forum.

* * * * * *

In an opinion delivered on September 28, 1955 in *Breswick & Co.* v. *Briggs*, the same judge, who was then a member of the three-judge court below, in effect dismissed the defense of reliance on the continuing validity of the ICC order dated June 5, 1945 and the SEC order date October 4, 1945. He held that "as a matter of law, their lack of legal effect was so obvious that professed reliance upon them in good faith is patently frivolous."[26] And he thus held by necessary implication that, as a matter of law, the individual defendants could not and did not rely in good faith on Section 15(2), although, under the literal mandate of that section, the ICC order dated June 5, 1945 continued in

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[24] 134 F. Supp. 132, 137-141. The district judge in *Breswick & Co.* v. *Briggs* was Walsh, J., who later sat below and concurred in the majority opinion on interlocutory injunction.

[25] It is not suggested that the motion should have been granted. There were other and sound reasons for its denial; but they are not relevant here. Except for those reasons, an appropriate disposition of the motion would have been denial without prejudice and with leave to renew upon a final ICC or judicial determination that Alleghany is not subject to ICC jurisdiction.

[26] *Breswick & Co.* v. *Briggs*, 135 F. Supp. 397, 400.

force until it was superseded by the status orders, and the status orders continued in force until they were suspended by the court below.[27]

F. The proceedings before the ICC:

In the proceedings on the merger and lease application the appellees filed several petitions for leave to intervene, of which all but the last were successively denied. One or more of these petitions admitted Alleghany's control of Central; and one or more denied actual control. But none of them denied the facts alleged by Alleghany respecting stock ownership, voting power, a common Chairman and common directors[28]—facts which plainly constitute control within the meaning of Section 1(3)(b).

One of these petitions referred to the pendency of *Breswick & Co.* v. *Briggs,* annexed a copy of the complaint in that action, and demanded an evidentiary hearing respecting the conspiracy allegations of the fifth count thereof.

On reconsideration by the full Commission of the Division 4 report and order dated March 2, 1955 (the first status order), the last of these petitions was granted as of May 24, 1955, the date of the report and order of the full Commission (the second status order).[29]

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[27] Section 15(2) provides as follows:

> "*Orders of commission.* Except as otherwise provided in this *chapter, all* orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and *shall continue in force until its further order,* or for a specified period of time, according as shall be prescribed in the order, *unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction.*"

[28] See pp. 14 and 17-18, *supra.*

[29] The Division 4 report and order and the full Commission's report and order are Documents 7-10 at pp. 55-104 of the Separate Appendix to Alleghany's jurisdictional statement. The contentions of the appellees in their last petition for intervention are summarized by the full Commission in Document 9 at p. 97.

The SEC also participated in the status order proceedings by submitting memoranda. These memoranda conceded the ICC's continuing jurisdiction under the order dated June 5, 1945 and the jurisdictional basis of the superseding status order sought by Alleghany. But they urged that the ICC had statutory discretion to relinquish all or part of its jurisdiction, and that it should exercise such discretion in favor of the SEC.

The ICC found *inter alia* that the merger and lease transactions, *and continued control of the affected properties through the Big Four by Central and Alleghany,* were transactions within the scope of Section 5(2), and would be consistent with the public interest.[30] It also found that Alleghany had acquired actual control as the result of the proxy fight and was exercising such control.

The ICC concluded *inter alia:* "that Alleghany's status as a carrier (under the order dated June 5, 1945) cannot be modified or otherwise altered unless and until we order an appropriate change"; that Alleghany's acquisition of con-

[30] The appellants contend that the ICC was right in concluding that Alleghany's acquisition of control of Central, the carrier parent of an established system, was not an acquisition of control of two or more carriers subject to approval and authorization upon appropriate findings under Section 5(2). But, if it was, they also contend: that a finding of acquisition of control of Central by Alleghany is necessarily implicit in the finding of continued control of the merged and leased properties by Central *and Alleghany;* that this implicit finding is amply supported by the admitted facts regarding stock ownership, voting power, a common Chairman, and common directors, regardless of any question of actual control; that no issue was raised respecting the consistency of Alleghany's acquisition of such control with the "public interest," as that term is defined in *U. S.* v. *Lowden,* 308 U. S. 225, 230 and *New York Central Securities Corp.* v. *U. S.,* 287 U. S. 12, 24-25; that no such issue was raised respecting Alleghany's continued control; that the finding of such consistency in respect of continued control necessarily implied a similar finding in respect of the acquisition of such control; that the express and implied findings of such consistency are supported by undisputed facts in the record relating to the "public interest" as so defined; and that these findings necessarily imply approval and authorization of the transactions to which they relate.

trol of Central, the carrier parent of an established system, was not a non-carrier acquisition of control of two or more carriers within the meaning of Section 5(2); that the merger and lease transactions constituted such acquisitions of control; that Alleghany was a necessary party to the application for approval and authorization of those transactions under *Marshall Transport;* that Alleghany should be considered as a carrier subject to the provisions of the Interstate Commerce Act specified in Section 5(3); and that it had no power to yield its jurisdiction to, or share it with the SEC.

* * * * * *

The appellees were permitted to intervene in the proceedings on the New Preferred Stock application. They attacked it for lack of jurisdiction and on the merits. On May 26, 1955 Division 4 granted the application by appropriate order. The accompanying report shows full consideration of the appellees' contentions on the merits. On June 22, 1955 the full Commission denied the appellees' petition for reconsideration in an order which made the order of Division 4 immediately effective.[31]

G. The proceedings in the District Court, and the stay granted by Mr. Justice Harlan:

The appellees commenced this action on June 6, 1955, before the final preferred stock order was issued. The original complaint therefore attacked the status orders only. It named the United States and the ICC as the sole defendants; and the only relief it sought was a judgment vacating the status orders insofar as they related to Alleghany and directing the ICC to set them aside to the

[31] The Division 4 report and order and the full Commission's order are Documents 11-13 at pp. 105-127 of the Separate Appendix to Alleghany's jurisdictional statement.

same extent. *Alleghany was not named as a defendant, and the original complaint sought no relief against it.*[32]

The original complaint is based on the same Investment Company Act theory as the complaint in *Breswick & Co. v. Briggs*. Indeed, it refers to its notice to the ICC of the pendency of that action and complains of the ICC's refusal of an evidentiary hearing reflecting the conspiracy allegations of the fifth count of the complaint therein. And it alleges that, by granting the status orders, the ICC unlawfully deprived the appellees and all other common stockholders of Alleghany "of the rights and protections afforded to them under the Investment Company Act", to their resultant irreparable damage.

Upon receipt of notice of the final preferred stock order on June 22, 1955, and in accordance with the terms of the Exchange Offer, the Exchange Agent began delivery of New Preferred Stock to the holders of Old Preferred Stock who had accepted the Exchange Offer and deposited their Old Preferred Stock thereunder. Approximately 900,000 shares of New Preferred Stock were delivered that day.

Later that day a judge of the court below granted an order to show cause which enjoined Alleghany and its agents from performing any act in furtherance of the Exchange Offer, pending determination of the appellees' motion for an interlocutory injunction against such acts. *Alleghany was not then a party to the action, and no pleading therein then challenged the preferred stock orders.*

On July 13, 1955 the original complaint was deemed amended, pursuant to stipulation, so as to include allegations challenging the preferred stock orders.

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[32] The appellants contend: that actions under the Urgent Deficiencies Act cannot be maintained against private persons; that affirmative relief in such actions can be granted only against the United States or the administrative agency which made the order under review; and that voluntary intervention by private persons under 28 U. S. C. §2323 does not clothe the district court with power to grant relief against them.

On July 21, 1955 the court below (Hincks, C. J. dissenting) delivered an opinion granting an interlocutory injunction *against Alleghany and its agents* in respect of the Exchange Offer; and on July 26, 1955 the order of interlocutory injunction was signed. The majority opinion and the reasons stated in the order base the relief thus granted on the appellees' claimed independent rights under the Investment Company Act.[33]

On August 9, 1955 Mr. Justice Harlan made an order granting Alleghany *supersedeas* and a stay of the interlocutory injunction in respect of the 900,000 shares of delivered New Preferred Stock.

Thereafter the appellees served a supplemental complaint relating to the preferred stock orders. It merges two inconsistent causes of action, of which one alleges that the ICC lacked jurisdiction, and the other deals with the merits of the Exchange Offer, the denial of an evidentiary hearing on its merits, the failure of the ICC to test it by appropriate legal standards, and the absence of substantial evidence to support the ICC's findings, and thus assumes ICC jurisdiction. The supplemental complaint prays for injunctive relief against the ICC and Alleghany.

Frank, C. J. replaced Hincks, C. J. and presided at the final hearing. The unanimous final opinion in favor of the appellees followed, and the judgment appealed from was entered on December 23, 1955. Except for modifications respecting the questions of reviewability and standing to sue, the final opinion amplifies and reaffirms the majority opinion on interlocutory injunction.

Two motions made prior to the entry of the judgment, one by the appellants for reargument and the other by Alleghany to set the judgment aside and for a new trial, were denied on January 27, 1956.

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[33] The order of interlocutory injunction, which was made before the appellants intervened, says: "This case presents only issues of law which are serious and *are resolved in favor of the plaintiffs.*"

H. The plight of the holders of New Preferred Stock and of receipts for deposited Old Preferred Stock:

The relevant facts are known to the Court, and further elaboration is unnecessary. The gravity of the situation is obvious, and is not disputed by the appellees. The holders of receipts for deposited Old Preferred Stock are in even worse case than the holders of New Preferred Stock; and they include the appellants and persons they represent.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

The appellants present all the questions discussed under this heading in Alleghany's Statement of Jurisdiction, and others which also have not been decided by this Court and are substantial.[34] In view of the fact that the Court has already noted probable jurisdiction of Alleghany's appeal (Docket No. 692), it would be superfluous to duplicate or supplement Alleghany's demonstration of substantiality, which is here repeated by reference.

CONCLUSION.

The Court should note probable jurisdiction.

Respectfully submitted,

EDWARD M. GARLOCK,
Attorney for Appellants, Baker, Weeks & Co., Oscar Gruss & Son, Irving Neuman, as trustee under a deed of trust dated November 6, 1943, and Edward Gornish.

Dated: May 7, 1956.

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[34] Some, but not the most important of these other questions, have already been indicated in the Statement of the Case.

Appendix A.

First Supplemental Opinion.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

Civil Action—File No. 101-114.

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Plaintiffs,

against

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, THE NEW YORK CENTRAL RAILROAD COMPANY, JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership, doing business as Gruss & Co., SAMUEL A. MEHLMAN, SALWYN SHUFRO, individually and on behalf of his firm, Shufro, Rose & Co., and in behalf of all holders of the 6% Convertible Preferred Stock of Alleghany Corporation similarly situated, BAKER, WEEKS & Co., OSCAR GRUSS & SON, IRVING NEWMAN as trustee under a deed of trust dated November 6, 1943, EDWARD GORNISH, and ADELAIDE NEUWIRTH on behalf of herself and all other common stockholders similarly situated,

Defendants.

Before: FRANK, Circuit Judge,

and

DIMOCK and WALSH, District Judges.

In our opinion of November 18, 1955, we neglected to say that the temporary injunction against Alleghany would

be made permanent. That is, however, our direction. Nevertheless we must consider how much, if any, of our order should be stayed pending appeal.

The temporary injunction, among other things, enjoined Alleghany, its transfer agents, officers, directors, servants or employees from transferring the new 6% preferred stock. That part of it was stayed by Mr. Justice Harlan, pending appeal, insofar as it related to the 900,000 shares of preferred stock already issued. In deference to him we similarly stay the corresponding part of our final injunction pending appeal.

For obvious reasons we will not stay any of the rest of the injunction against Alleghany, its transfer agents, officers, directors, servants or employees.

We need not, and do not, now consider the legal consequences, if any, of the transfers of new preferred stock which occurred after the issuance, by Justice Harlan, of a partial stay of this Court's preliminary injunction. Should the Supreme Court reverse our final order consideration of that matter will not be necessary; should there be no appeal from our order, or if the Supreme Court should affirm our order, we will, unless the Supreme Court otherwise directs, consider the matter on the application of the plaintiffs or intervenor-plaintiffs.

At New York, N. Y.
in said district, on
December 23, 1955.

/s/ JEROME N. FRANK,
United States Circuit Judge.

/s/ E. J. DIMOCK,
United States District Judge.

/s/ LAWRENCE E. WALSH,
United States District Judge.

Appendix B.

Second Supplemental Opinion.

[Same Title.]

Before: Frank, Circuit Judge,
and
Dimock and Walsh, District Judges.

In footnote 7a to our opinion of November 18, 1955, to which this is a supplement, we made a statement indicating that Alleghany controlled United States Trucking Company until May 21, 1954. We made this statement out of abundant caution on the strength of information to that effect in a letter from one of the parties. Another of the parties now states that what we said in the footnote was misleading. The statement in our footnote had no effect upon our decision and does not constitute a finding of fact or conclusion of law.

At New York, N. Y. in said district, on January 27, 1956.

/s/ Jerome N. Frank,
United States Circuit Judge.

/s/ E. J. Dimock,
United States District Judge.

/s/ Lawrence E. Walsh,
United States District Judge.

Appendix C.

Opinion on Supersedeas Pending Appeal.

[Similar Title.]

Hincks, C. J.:

I think the stay sought should be granted. The hardship both on Alleghany and its stockholders is plain. This was described in my dissenting opinion addressed to the plaintiffs' application for the preliminary injunction. The injunction granted at most has urgency only for its effect in restraining the completion of Alleghany's exchange offer. This feature of the injunction has its chief impact on innocent stockholders. At the hearing, Alleghany made representations, which to me were highly credible, to the effect that the utmost possible damage to the plaintiffs from the dilution of their stock which might result from the exchange offer aggregated $1,015. I think a bond of $2,500 would adequately protect the plaintiffs legitimate pecuniary interest. The injunction, insofar as it is addressed to the orders of the Interstate Commerce Commission, is not at all needed to protect plaintiffs' pecuniary interest. Nor will the plaintiffs be at all injured if it goes into effect not until after the order of injunction is affirmed on appeal. Its suspension pending appeal will save the established practice of the Interstate Commerce Commission from disturbance pending a final decision as to its validity. The suspension is also desirable to prevent the hardship to Alleghany mentioned in my dissenting opinion and also to enable the New York Central Railroad Company, which was a party to the proceedings before the Commission and is a party in this case, to proceed with arrangements for its own internal reorganization in which these plaintiffs under no theory have a legitimate interest.

July 26, 1955.

Appendix D.

Opinion on Supersedeas Pending Appeal.

[Similar Title.]

Dimock, D. J.:

Defendants moved for a suspension of an injunction pending appeal to the Supreme Court, presumably under authority of Rule 62(c) F. R. C. P.

The action is one to enjoin permanently the enforcement of orders of the Interstate Commerce Commission by which the Commission has, in effect, assumed jurisdiction, to the exclusion of the Securities and Exchange Commission, over the security issuing activities of Alleghany Corporation and by which it has authorized a particular exchange of 6% preferred stock for 5½% preferred stock.

Plaintiffs contend that the I. C. C. has no power to assume such jurisdiction because Alleghany does not have "control of a carrier" within the meaning of Section 5(2) of the Interstate Commerce Act, 49 U. S. C. §5(2) that the I. C. C.'s finding of such control was insufficient and that the I. C. C. committed substantial error in refusing plaintiffs a hearing on the question.

On a motion for a preliminary injunction, a three-judge court has held that the I. C. C.'s findings were insufficient and that it committed substantial error in refusing plaintiffs a hearing. The court has accordingly enjoined, pending final hearing, the enforcement of the I. C. C.'s assumption of jurisdiction and the consummation of the exchange. The injunction against the consummation of the exchange continued in force a restraining order to the same effect.

Alleghany, on February 10, 1955, mailed to the holders of its 5½% preferred stock an offer for its exchange for a new 6% preferred stock.

On February 15, 1955 plaintiff Breswick & Co. sought from the Commission leave to intervene in the proceeding which resulted in the jurisdiction assuming order. Alleghany opposed and leave was originally denied.

The preferred stock exchange offer required all who wished to accept it to deposit their stock certificates. It was conditional upon approval by the I. C. C. and its acceptance by 100,000 shares or such lesser number as the corporation might deem satisfactory to it. On the expiration of five business days after the issuance of the I. C. C. order the stock could not be withdrawn. There was no provision postponing the consummation of the exchange in the event of court review of the I. C. C. approval.

A proceeding was brought before the I. C. C. for the approval of the exchange and plaintiffs sought leave to intervene. Like the application for leave to intervene in the other proceeding, this was opposed by Alleghany and originally denied by the I. C. C. After a decision by Judge Walsh in another case, however, intervention in the preferred stock proceeding was permitted by the I. C. C. Plaintiffs filed a brief taking the position that approval should not be given and closing with the request in substance that, if the I. C. C. should be disposed to grant approval, its order should be stayed long enough to permit plaintiffs to begin court proceedings before the exchange should be consummated.

In spite of this request, the full Commission issued an order approving the exchange dated June 22, 1955. Alleghany learned of this about noon on June 23, 1955 and, although plaintiffs had already noticed in this case a motion for a preliminary injunction against assumption of jurisdiction by the I. C. C., immediately began issuing the new preferred stock to those who had accepted the exchange offer. Plaintiffs learned of the I. C. C. approval in the middle of the afternoon and, at 5:55 P. M. obtained a temporary restraining order against further exchange and against transfer of the new stock. By that time, however, more than half of the new stock had been issued. The restraining order has been continued as a preliminary injunction pending final hearing.

Alleghany now seeks to avoid the hardships to which this state of affairs subjects it and asks that the injunc-

tion be suspended pending appeal. The result of suspending the injunction, so far as the exchange of preferred stock is concerned, would be in substance a modification of the court's decision. The exchange would take place and plaintiffs would be left to their remedy at law, if any.

If Alleghany were the only person subjected to hardships the question would be easy. All that Alleghany offers plaintiffs is money indemnity and the basis of the award of the injunction was that money indemnity would be inadequate. Moreover, Alleghany finds itself subject to hardships only because of its original omission to take into account the possibility of court review and its later precipitate action under the I. C. C.'s order while the question of the I. C. C.'s jurisdiction were *sub judice.*

What makes the question perplexing is the plight of innocent stockholders who have given up their old preferred stocks and have got a frozen asset in return. Alleghany, pleading the cause of these innocent people as a reason why plaintiffs should be deprived of what I conceive to be their legal rights, seems to me an invader who drives before his soldiers a protecting barrage of civilians.

I vote to deny the application for a suspension of the injunction pending appeal.

Dated: July 26, 1955.

/s/ E. J. Dimock
United States District Judge

Appendix E.

Final Judgment.

[SIMILAR TITLE.]

Before: FRANK, Circuit Judge,

and

DIMOCK and WALSH, District Judges.

This action, to enjoin and set aside certain orders of the Interstate Commerce Commission and to enjoin Alleghany Corporation, having come on for final hearing on September 14 and 15, 1955, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleading and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises, and having on November 18, 1955, filed herein its opinion, containing its findings of fact and conclusions of law; now, in accordance with the said opinion and its supplemental opinion of December 23, 1955, findings, and conclusions, it is

ORDERED, ADJUDGED AND DECREED that the orders of the Interstate Commerce Commission, dated March 2, 1955 and May 24, 1955, entered in Finance Docket Nos. 14692 and 18656, be and they hereby are enjoined, set aside, annulled and voided except insofar as they approved and authorized the merger of the properties and franchises of the Louisville and Jeffersonville Bridge & Railroad Company into the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, for ownership, management and operation, and through ownership of the stock of the latter company, control of the said properties and franchises by the New York Central Railroad Company, and the inclusion of the properties and franchises of the Louisville and Jeffer-

sonville Bridge & Railroad Company by modification under the lease of January 2, 1930, between the New York Central Railroad Company and the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, respecting operation of the properties of the latter; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the orders of the Interstate Commerce Commission, dated May 26, 1955 and June 22, 1955, entered in Finance Docket No. 18866, authorizing Alleghany Corporation to issue (a) not exceeding 1,367,440 shares of 6% convertible preferred stock, par value $10 per share, to be offered to the holders of its cumulative 5½% preferred stock, Series A, par value $100 a share, in exchange, on the basis of 10 shares of 6% convertible preferred stock for each share of cumulative 5½% preferred stock, Series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1.00 a share, upon conversion of such 6% convertible preferred stock on the basis set forth in the application of Alleghany Corporation and the report of the Interstate Commerce Commission, be and they hereby are enjoined, set aside, annulled and suspended; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that Alleghany Corporation, its transfer agents, officers, directors, servants and employees, be and are hereby enjoined from taking any steps in connection with or in furtherance of the issuance of said 6% convertible preferred stock in exchange for said 5½% preferred stock, or for any other purpose, or the transfer thereof; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the enforcement of this judgment and the injunctions issued herein, subject to the exception stated in the next paragraph, is hereby suspended for a period of 30 days from the date hereof to permit any defendant or defendants in this action to file notice of appeal to the Supreme Court of the United States from this judgment and the injunctions contained herein, and upon filing of said notice of appeal by any defendant in this action, the enforcement of this judgment

and the injunctions contained herein shall be further suspended until the issuance of a mandate from the Supreme Court of the United States; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the stay pending appeal provided by the foregoing paragraph, except to the extent provided in the next paragraph, shall not apply to so much of said judgment and injunctions as is directed to Alleghany, its transfer agents, officers, directors, servants or employees, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that, despite the provisions of the last preceding paragraph, the stay provided by the paragraph last but one shall apply to said judgment and injunctions to the extent that they enjoin Alleghany, its transfer agents, officers, directors, servants or employees from transferring the 900,000 shares of 6% convertible preferred stock issued prior to the stay granted by Mr. Justice Harlan.

At New York, N. Y. in said district, on December 23, 1955.

/s/ JEROME N. FRANK,
United States Circuit Judge.

/s/ E. J. DIMOCK,
United States District Judge.

/s/ LAWRENCE E. WALSH,
United States District Judge.

Appendix F.

Portions of the Interlocutory Injunction.

[SIMILAR TITLE.]

* * * * * * *

ORDERED, that defendants, Interstate Commerce Commission and Alleghany Corporation, be and they hereby are restrained, pending final judgment in this cause, from enforcing or taking any action pursuant to (a) the orders of the Interstate Commerce Commission made March 2, 1955 and May 24, 1955, in Finance Dockets 14692 and 18656, in so far as they determine that Alleghany Corporation is in control of the New York Central Railroad and in so far as they determine that Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20 (1) to (10) inclusive and Section 20a (2) to (11) inclusive of the Interstate Commerce Act, or (b) the orders of the Interstate Commerce Commission made May 26, 1955 and June 22, 1955 in Finance Docket 18866, authorizing issuance of 6% Convertible Preferred Stock; and it is further

ORDERED, that Alleghany Corporation, its transfer agents, officers, directors, servants and employees, and each of them, be and they hereby are enjoined from issuing, distributing or transferring or converting into Common Stock any of the 6% Convertible Preferred Stock of Alleghany Corporation, which was the subject of the application before the Interstate Commerce Commission in Finance Docket No. 18866, or attempting to do so, pending final judgment in this cause; and it is further

* * * * * * *

ORDERED, that plaintiffs furnish, within three days after the entry of this order, a bond in the sum of $1,000 as security for the payment of such costs and damages as may be incurred or suffered by Alleghany Corporation if it be found to have been wrongfully enjoined by this order.

The reasons for the issuance of this preliminary injunction are:

1. This case presents only issues of law which are serious and are resolved in favor of the plaintiffs.

2. That unless the enforcement of the orders complained of be enjoined pending final hearing plaintiffs will suffer irreparable damage in that:

A. As found by this court plaintiffs have the right to invoke the protections of the Investment Company Act against jurisdiction of the Interstate Commerce Commission unlawfully asserted and have no adequate remedy at law to vindicate that right.

B. The unlawful acts of the Interstate Commerce Commission have deprived plaintiffs of the preferences, privileges and protection of the Investment Company Act and the Interstate Commerce Act against manipulation of those in control of Alleghany Corporation, including the possibility of dilution of the equity of the common stockholders by conversion of the new preferred stock and yet be remediless in spite of the adjudged illegality of the preferred stock.

C. Unless the issuance of the proposed preferred stock is enjoined it will be issued and in many cases reach the hands of bona fide purchasers so that an unscrambling, in the event of a determination that the Interstate Commerce Commission approval was unlawful, would be a practical impossibility.

D. The Investment Company Act was enacted to protect the national public interest and the interest of investors, one of the purposes being to protect investors in investment companies against the managing of those companies in the interests of persons other than the investors, and the preliminary injunction is necessary to preserve for the plaintiffs the benefits and protection of the Investment Company Act, pending final hearing.

E. The denial of a preliminary injunction would deprive plaintiffs of findings required by Section 5(2) of the Interstate Commerce Act, that the orders reviewed are consistent with the public interest and otherwise comply with the provision of said Sections 5(2) and 5(3).

Dated: New York, N. Y., July 26, 1955.

s/ E. J. Dimock,
U. S. D. J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

BAKER, WEEKS & CO., OSCAR GRUSS & SON, IRVING NEUMAN, as trustee under a deed of trust dated November 6, 1943, and EDWARD GORNISH,

Appellants,

vs.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS.

EDWARD M. GARLOCK,
521 Fifth Avenue,
New York 17, New York,

Attorney for Appellants, Baker, Weeks & Co., Oscar Gruss & Son, Irving Neuman, as trustee under a deed of trust dated November 6, 1943, and Edward Gornish.

ERRATA

Page 8, line 1: "termination" should read "determination".

Page 11, line 8: "Section 12(11)" should read "Section 12(1)".

Page xxx, lines 6-7: "evidence" should read "credence".

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 82

BAKER, WEEKS & Co., OSCAR GRUSS & SON, IRVING NEUMAN, as trustee under a deed of trust dated November 6, 1943, and EDWARD GORNISH,

Appellants,

vs.

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS.

The appellants respectfully request denial of the appellees' motion to dismiss this appeal, for the reasons stated below.

1.

The failure of counsel for the appellants to file a brief was not due to any lack of diligence or good faith. It was the result of circumstances beyond his control, which unavoidably prevented full performance of a duty he earnestly tried to perform. When the telegram mentioned by the appellees was reluctantly sent on January 15, approximately 30 pages of text and 34 pages of appendices had

already been printed in page proof, and more than 60 additional pages of text and appendices had been prepared for printing. This work involved a great expenditure of time and effort; and the opinion is respectfully ventured that, if circumstances had permitted timely completion of the appellants' brief, it would have rendered a measurable service to the Court. It may yet render that service, if the Court should order further argument or a rehearing and permit submission by the appellants.

Solely for the purpose of indicating the nature and extent of the effort by counsel for the appellants to perform his duty to the Court and his clients, the 30 pages of text which had already been printed in page proof by January 15 are annexed as Appendix A (*infra* pp. i-xxx).[1]

2.

The appellants are the only parties who raised and argued certain important questions below, who formally pleaded affirmative defenses below, and who explicitly presented certain questions for review in their notice of appeal and their statement as to jurisdiction. Hence, dismissal of their appeal might limit the scope of the Court's review respecting the appeals in Nos. 36 and 114 and adversely affect the interests, not only of all the appellants in the consolidated cases, but also of all the preferred stockholders who have been injured by the judgment appealed from. It must be assumed that the

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[1] As examples of the nature and extent of that effort, the Court is respectfully referred to footnote 7, and the discussion of *Breswick & Co.* v. *Briggs*, *infra* pp. ix-xii, xxii-xxvii.

Appendix A includes relatively minor manuscript corrections and additions which had been made but not set in type by January 15.

Appendix A contains a major part of the material in the appellants' uncompleted brief preceding the argument; but it nevertheless includes some argument. It is not, of course, annexed for the purpose of submitting such argument by indirection, but for the sole and proper purpose stated above.

appellees seek this possible advantage, since the motion to dismiss can yield no other substantial benefit.

(a)

The appellants were permitted to intervene on September 2, 1955, after the interlocutory injunction was granted (Unprinted Record, pp. 648-685). They moved for reargument on December 21, 1955, after the final opinion was rendered (Unprinted Record, pp. 877-878), on an affidavit by counsel for the appellants (Unprinted Record, pp. 879-881) and an annexed printed brief containing 82 pages of text and footnotes which the district court later described as "elaborate" (R. 679).

This brief originated the argument based on the holding in *New York Central Securities Corporation* v. *U. S.*, 54 F. 2d 122, aff. 287 U. S. 12 (1932), that a lease by a carrier parent of properties of a carrier subsidiary constituted an acquisition of control under Section 5(2) of the Interstate Commerce Act as it then read, *regardless of existing control through stock ownership.*

None of the other defendants below (including the appellants in Nos. 36 and 114) had theretofore mentioned the fact that the application before the ICC involved and the status orders approved, not only a merger of the Bridge Company's properties into the Big Four, but also a lease by the Big Four to Central of the properties so merged; and none of them had theretofore mentioned or based any argument on the related holding in *New York Central Securities Corporation.*[2]

The opinion of the district court on interlocutory injunction did not mention the lease or that holding, and inter-

[2] The appellants in Nos. 36 and 114 cited and relied on *New York Central Securities Corporation* below, solely in relation to the questions of reviewability and standing to sue; and the opinions below on interlocutory injunction and final judgment limit discussion of that case to those questions (R. 607, 610-611, 660-661).

preted Section 5(2)(a)(i) solely in relation to the merger (R. 615-621). Its opinion on final judgment also failed to mention that holding; but it did refer to and dispose of the lease in the following passage (R. 667-668):

> "Defendants apparently do not contend that the application for permission for Central to lease the properties of the Bridge Company, which was also submitted to the Commission, constitutes an acquisition of control by Alleghany. In any event, such a claim would be misplaced. Where there is already complete stock control of the components of a system, their over-all control does not depend on intrasystem leases. And the Commission has not expressed any support for such a claim. In *Nicholas, Fayette & Greenbrier R. Co. Lease*, 261 I. C. C. 546 (1945), it held that parents acquire control as a result of the joint lease of property of a jointly owned subsidiary.[9] This holding, whether defensible or not in cases of subsidiaries held by more than one carrier, as to which a lease could work a shift of power between the two holding companies, has no applicability to the present case which only involves wholly owned subsidiaries of a single holding company. * * *

[9] "The I. C. C. held that Alleghany, as the parent of C. & O. was a necessary party to an application by C. & O. and New York Central to lease an extension of the Greenbrier, a carrier which C. & O. and Central already controlled by stock ownership."[3,4]

[3] The district court's references to "*complete* stock control of the components of a system" and "*wholly* owned subsidiaries of a single holding company" are incorrect. Central owned 98.98% of the Big Four's common stock and 86.45% of its preferred Stock (R. 217). Since the Big Four was not a wholly owned subsidiary of Central, neither was the Bridge Company, which was wholly owned only by the Big Four.

[4] The appellant's uncompleted brief contains a discussion of the *Greenbrier* case [in relation to the almost contemporaneous decision in *Chesapeake & Ohio Railway Company Purchase*, 261 I. C. C. 239, 260-261 and the preceding decision in *U. S.* v. *Marshall Transport Co.*, 322 U. S. 31 (1944)] and of the district court's quoted comment thereon, which may be useful to the Court if it orders further argument or a rehearing.

One of the major points of the appellants' brief for reargument dealt with the proposition that the holding of *New York Central Securities Corporation* was applicable to the case at bar under Section 5(2)(a)(i) and, if Alleghany controlled Central, required the district court to hold that the lease constituted an acquisition of control, subject to ICC approval and authorization, regardless of existing control of the leased properties through stock ownership.[5] This was the only point in the appellants' brief for reargument which the district court honored by discussion, however brief. It said (R. 679-680):

> "Only one of the points raised in the elaborate brief submitted in support of the motion requires comment. The earnestness with which defendants' position is advanced leads us to take note of it. It is said that New York Central Securities Corp. *v.* United States, D. C. S. D. N. Y., 54 F. 2d 122, aff'd 287 U. S. 12, stands for the proposition that where a parent corporation which has theretofore controlled a subsidiary by virtue of stock ownership modifies that form of control by entering into a lease of the properties of the subsidiary, the transaction constitutes an acquisition of control within the terms of Interstate Commerce Act, §5(3), 49 U. S. C. A. §5(3). Suffice it to say that in the New York Central Securities case the court dealt with section 5(2) of the Transportation Act of 1920, 49 U. S. C. A. §5(2), *which did not distinguish between transactions which did and did not constitute acquisitions of control.*
>
> "The statute here involved, Interstate Commerce Act, §5(2), 49 U. S. C. A. §5(2), *draws just that dis-*

[5] A subsequent letter memorandum directed the districts court's attention to the long line of ICC decisions under former Section 5(2), which uniformly held that a lease constituted an acquisition of control subject to ICC authorization and approval regardless of existing control through stock ownership. Some of these decisions are cited in the opinion of the district court in *New York Central Securities Corporation*, 54 F. 2d 122, footnotes 5 and 6 at p. 126.

> *finction and classifies transactions between those which are mere mergers, leases, etc. and those which involve the acquisition of control.* It is only those transactions which involve the acquisition of control which may form the basis for an order under section 5(3) that a person not a carrier shall be considered as a carrier.'"[6]

It is submitted that, in respect of the questions raised by this opinion, the motion to dismiss should be denied for at least two reasons:

First: Denial would assure that those questions are properly before the Court, although the appellants in Nos. 36 and 114 made no argument below based on the lease and the related holding in *New York Central Securities Corporation.* It is not suggested that, if the motion were granted, any serious doubt could arise that those questions are nevertheless properly before the Court. Denial would simply foreclose the possibility of doubt, however remote and insubstantial.

Second: None of the appellants in Nos. 36 and 114 have discussed the opinion denying reargument, or sought to demonstrate by direct analysis: that Section 5(2)(a)(i)

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[6] The references in the first paragraph to Section 5(3) are erroneous. The district court obviously intended to refer to Section 5(2).

[*] The italics have been added.

Apparently the district court thought that this holding made it unnecessary to consider the appellants' analysis and interpretation of Section 5(2)(a)(i) in relation to its underlying policy respecting ICC regulation of railroad holding companies, its legislative history [including the addition of the words "or otherwise" to the control clauses in 1940 and the simultaneous enactment of Section 1(3)(b)], its statutory context [including Sections 1(3)(b) and 5(4)], the decision in *Marshall Transport* (including the holding that the several clauses of Section 5(2)(a)(i) are interdependent), and the long and consistent line of ICC decisions under former Section 5(2) respecting leases as acquisitions of control despite existing control through stock ownership.

does not draw the distinction which the district court says it does (between mergers, leases, purchases and operating contracts on the one hand, and acquisitions of control on the other); and that such an interpretation cannot be reconciled with the reasoning of *Marshall Transport*. If the Court entertains any doubt regarding the validity of these propositions, and orders further argument, these appellants, who raised the issue involved, ought then to be heard.

(b)

In its opinion on interlocutory injunction, the district court said (R. 620-621):

> "Our conclusion * * * does not mean that the proceeding below must be dismissed. * * *
>
> "We do not think that the I. C. C. was without jurisdiction in the proceeding below to approve that acquisition (*i.e.*, Alleghany's acquisition of control of Central). * * * The case must go back for consideration of that question (whether such control is 'consistent with the public interest') if Alleghany persists in its claim that it has acquired control of New York Central and in its desire for a declaration of its right to be 'considered as a carrier'."

But in its opinion on final judgment the district court reversed itself and said (R. 670):

> "The opinion on the application for a preliminary injunction departed too far from reality in taking the position that the application to the ICC implied a request that it pass on the propriety of Alleghany's control of the Central. We believe that the ICC had no appropriate application before it for a determination of the question of control. The case cannot, therefore, be remanded for such a determination.
>
> "If we are wrong, however, in this holding that the ICC is without jurisdiction, the case should be

remanded for the termination of (1) whether Alleghany does control Central and (2) whether such control is in the public interest."

These appellants are the only appellants in the consolidated cases who expressly raised the question posed by these contradictory rulings. Question 8 in their Statement as to Jurisdiction reads (pp. 8-9):

"8. Did the District Court err:

"(a) in holding that the ICC lacks jurisdiction to determine whether Alleghany controls Central and whether its acquisition of such control is consistent with the public interest, in the absence of an application by Alleghany for ICC approval and authorization of its acquisition of such control pursuant to said Section 5(2); and

"(b) in refusing, for that reason, to remand the case to the ICC with appropriate instructions regarding the determination of those questions?"

It is submitted that, in respect of this question, the motion to dismiss should be denied for reasons similar to those already urged in respect of the lease and the related holding of *New York Central Securities Corporation*.

(c)

These appellants are the only appellants in the consolidated cases who have expressly raised on appeal the question whether the admitted facts (respecting common directors, a common Chairman, a common Vice-President, at least one common important stockholder, the wide distribution of Central's stock, Alleghany's concentrated voting power, and the additional voting power of its Chairman and its President) not only support the ICC's finding that Alleghany controls Central but compel a finding of such control within the meaning of Section 1(3)(b), regardless

of any question raised by the appellees respecting the independence of some of Central's directors.[7]

It is submitted that, in respect of this question too, the motion to dismiss should be denied for reasons similar to those already urged.

(d)

These appellants are the only appellants in the consolidated cases who raised below and on appeal certain other important questions. For example:

(1) They alone seriously argued below and raised on appeal the question whether the appellees have any private rights of action to enforce the injunctive remedies confided by the Investment Company Act to SEC discretion.[8]

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[7] See: Question 8 in the appellants' notice of appeal (R. 29); Question 9(b) in their Statement as to Jurisdiction, at p. 9; and pp. 14 (including footnotes 11 and 12), 17-18 and 23 of the jurisdictional statement.

Most of the relevant and undisputed facts are stated in the merger and lease application (R. 217-218) and in the report of Division 4 (R. 452-3). The number of Central's outstanding shares of common stock and the number of holders thereof are shown in the table at p. 220 of the Record.

The appellants' jurisdictional statement failed to mention common important stockholders. But the merger and lease application showed that Alleghany and Central had at least one important stockholder in common, Allan P. Kirby (the President of Alleghany and a director of Central), who was the owner of 500,000 shares of Alleghany's common stock or more than 10% of the 4,637,797 outstanding shares of such stock (¶ I(b)1(4) of the merger and lease application in the Unprinted Record R. 575, 577), as well as 300,100 shares or almost 5% of Central's outstanding stock. The application also showed that Robert R. Young, the common Chairman of Alleghany and Central, owned 100,200 shares of Central stock (R. 217-218); and his ownership of a substantial stock interest in Alleghany was affirmatively alleged by the appellees in the complaint (R. 33) and in the record before the ICC (*e.g.*, R. 323), and shown in the Exchange Offer (R. 362).

[8] See: Questions 1(c) and (d) of the appellants' notice of appeal (R. 26); and Questions 2(b) and (c) at p. 5 of their Statement as to Jurisdiction. In his dissenting opinion on interlocutory injunction Judge Hincks held that the appellees had no such private rights of action (R. 633).

(2) They alone challenged below and expressly put in issue on appeal the power of the district court, in an action under the Urgent Deficiencies Act, to determine any question which the ICC could not lawfully and did not determine, and hence its power to determine and enforce the appellees' claim respecting Alleghany's status under the Investment Company Act.[9] And they alone made the corollary argument below that, absent such power and such a resultant determination and enforcement, the Exchange Offer was lawful even if the ICC lacked jurisdiction to approve it.

(3) They alone pointed out to the district court, in the letter memorandum which supplemented their brief for reargument, that since the decision in *Marshall Transport* the ICC has been consistent in its rulings that mergers, leases and purchases affecting the properties of carrier subsidiaries constitute acquisitions of control by the non-carrier parents under Section 5(2)(a)(i), and that the non-carrier parent is a necessary party to an application under Section 5(2)(b) for authorization and approval of such a transaction. And they alone expressly challenged on appeal the holding below, based without distinction on cases before and after *Marshall Transport*, that the ICC rulings on those questions have been inconsistent and are not entitled to weight on judicial review.[10]

(4) Only these appellants pointed out to the district court, in the letter memorandum which supplemented their brief for reargument, that, in respect of the lease, Alleghany is the *immediate* parent of the lessee (Central).

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[9] See: Questions 1(b) and (d) of the appellants' notice of appeal (R. 26); and Questions 2(a) and (c) at p. 5 of their Statement as to Jurisdiction.

[10] See: Questions 6(c), (d) and (e) in the appellants' notice of appeal (R. 29); and Questions 6(c), (d) and (e) at pp. 7-8 of their Statement as to Jurisdiction.

(5) Only these appellants raised, below and here, the question whether, if Alleghany acquired control of Central in violation of Section 5(4), it is subject to ICC regulation in respect of that violation under Sections 5(7), 5(8) and 5(9), regardless of the validity of the status orders.[11]

(6) Only these appellants raised, below and here, the question whether, if Alleghany controls Central, it is subject to ICC regulation under Section 12(11), whether or not its acquisition of such control was lawful, and regardless of the validity of the status orders.[12]

* * * * * * *

It is submitted that, in respect of these questions also, the motion to dismiss should be denied for reasons similar to those already urged in respect of other questions, and to assure the Court's freedom, in the interests of substantial justice, to consider them *sua sponte*.

(e)

These appellants are the only appellants in the consolidated cases who formally pleaded affirmative defenses, including the defense based on the doctrine of balancing equities which has been invoked in argument by appellants in No. 36. Their pleadings were omitted from the printed Record; and, for convenient reference, their affirmative defenses are annexed as appendices hereto. Their answer

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[11] See: Questions 7(a) and (b) in the appellants' notice of appeal (R. 29); and Questions 7(a) and (b) at p. 8 of their Statement as to Jurisdiction.

Registration under the Investment Company Act is voluntary, and the SEC acquires jurisdiction over an unregistered investment company solely to prevent or punish a violation. The question is why the ICC does not similarly acquire jurisdiction respecting a violation of Section 5(4).

[12] See: Question 7(c) in the notice of appeal (R. 29), and in the jurisdictional statement at p. 8.

to the original complaint appears at pp. 776-804 of the Unprinted Record; and the affirmative defenses alleged therein are annexed as Appendix B, *infra* pp. xxxi-xlviii. Their answer to the supplemental complaint appears at pp. 806-814 of the Unprinted Record; and the additional affirmative defense alleged therein is annexed as Appendix C *infra* p. xlix.

The appellants have presented the question whether the district court erred in dismissing their defenses.[13] In point of fact, the district court did not dismiss them; it simply ignored them. The opinions on final judgment and reargument do not mention them; and the final judgment is similarly silent.

* * * * * *

The first defense pleaded in the first answer alleges facts showing that indispensable parties were not before the court, that the court could not restore the *status quo ante* either the preliminary injunction or the order of the Supreme Court dated August 9, 1955, and that it could not otherwise render an effective final judgment enjoining consummation of the Exchange Offer (¶¶21-31, *infra* pp. xxxiv-xlii).

The district court itself originally recognized the validity of such a defense (R. 613):

> ". . . Here, unless the issuance of the proposed preferred stock is enjoined it will be issued and in many cases reach the hands of bona fide purchasers *so that an unscrambling,* in the event of a determination that the I. C. C. approval was unlawful, *would be a practical impossibility. Plaintiffs would then . . . be remediless in spite of the adjudged illegality of the preferred stock.*" (Emphasis added).

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[13] See: Question 9 in the notice of appeal (R. 29) and Question 10 in the jurisdictional statement at p. 9.

Nevertheless, in a supplement to the opinion on final judgment, the district court said (R. 674):

> *"We need not, and do not, now consider the legal consequences, if any, of the transfers of new preferred stock which occurred after the issuance, by Justice Harlan, of a partial stay of this Court's preliminary injunction.* Should the Supreme Court reverse our final order, consideration of that matter will not be necessary; should there be no appeal from our order, or if the Supreme Court should affirm our order, we will, unless the Supreme Court otherwise directs, consider the matter *on the application of the plaintiffs or intervenor-plaintiffs."* (Emphasis added)

Of course, the validity and relevance of this defense depends on whether the district court validly exercised plenary equity powers, in an action under the Urgent Deficiencies Act, to enjoin an alleged violation of the Investment Company Act.

* * * * * *

The second defense pleaded in the first answer (¶¶32-39, *infra* pp. xlii-xlvii) alleges facts showing that the equities in favor of the appellants and others, including the general public, heavily outweigh the equities in favor of the appellees.

Here again the validity and relevance of this defense depends on whether the district court validly exercised plenary equity powers, in an action under the Urgent Deficiencies Act, to enjoin an alleged violation of the Investment Company Act.

* * * * * *

The fifth defense pleaded in the second answer (¶¶ 20-22, *infra* p. xlix) relies on Section 20a(11) of the Interstate Commerce Act, which expressly insures the validity of securities issued pursuant to an order made thereunder,

regardless of any subsequent determination respecting the validity of the order itself.

* * * * * * *

It is submitted that the existence of these formally pleaded defenses are additional reasons for denial of the motion to dismiss.

3.

Finally, nothing in the Rules of this Court provides for dismissal of an appeal after it is docketed. Rule 14 relates only to dismissal of an appeal before it is docketed. There is no other relevant rule. The Court doubtless has inherent power to grant the motion; but, it is submitted, the circumstances here do not warrant the exercise of that power.

4.

The Court is respectfully requested to deny the motion.

Respectfully submitted,

EDWARD M. GARLOCK,
Attorney for Appellants, Baker, Weeks & Co., Oscar Gruss & Son, Irving Neuman, as trustee under a deed of trust dated November 6, 1943, and Edward Gornish.

APPENDIX A.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 82

BAKER, WEEKS & CO., OSCAR GRUSS & SON, IRVING NEUMAN, as trustee under a deed of trust dated November 6, 1943, and EDWARD GORNISH,

Appellants,

vs.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

The judgment appealed from (R. 555-557):

(1) enjoined, set aside, annulled and voided two orders of the Interstate Commerce Commission (ICC), respectively dated March 2, 1955 and May 24, 1955 and entered in Finance Dockets Nos. 14692 and 18656 (the status orders), to the extent that said orders asserted ICC jurisdiction over Alleghany Corporation (Alleghany) and subjected it to regulation under the Interstate Commerce Act;

(2) enjoined, set aside, annulled and suspended two ICC orders, respectively dated May 26, 1955 and June 22, 1955 and entered in Finance Docket No. 18866 (the preferred stock orders), which authorized Alleghany to issue (a) not exceeding 1,367,440 shares of $10 par value 6% convertible preferred stock (New Preferred Stock) in exchange for its existing $100 par value cumulative 5½% preferred stock (Old Preferred Stock), on the basis of 10 shares of New Preferred Stock for each share of Old Preferred Stock, and (b) not exceeding 14,768,352 additional shares of $1.00 par value common stock, upon conversion of New Preferred Stock; and

(3) enjoined Alleghany and its agents from taking any steps in connection with or in furtherance of the issuance of New Preferred Stock in exchange for Old Preferred Stock, or for any other purpose, or the transfer thereof.

Opinions Below.

The reported opinions of the District Court are:

the majority opinion for, and the dissenting opinion against interlocutory injunction, dated July 21, 1955, (R. 601-639), reported at 134 F. Supp. 132;

the opinion on final judgment dated November 18, 1955 (R. 651-673), reported at 138 F. Supp. 123; and

two memorandum opinions dated January 27, 1956, which respectively denied Alleghany's motion for a new trial and the appellants' motion for reargument (R. 675-680), reported at 138 F. Supp. 123, 138-140.

The unreported opinions of the District Court are: two opinions, dated July 26, 1955, which resulted in denial of supersedeas pending Alleghany's appeal from the interlocutory injunction (R. 639-642); and two opinions, respec-

tively dated December 23, 1955 and January 27, 1956, supplemental to the opinion on final judgment (R. 674-675, 680).

The opinion of Mr. Justice Harlan dated August 3, 1955, which in part granted and in part denied Alleghany's application to this Court for supersedeas (R. 643-650), is reported at 75 Sup. Ct. 912.

The report of Division 4 of the ICC which accompanied the first status order dated March 2, 1955 (R. 414-446) is reported at 290 ICC 725; and the report of the full Commission which accompanied the second and final status order dated May 24, 1955 (R. 506-515) is reported at 295 ICC 11.

The report of Division 4 which accompanied the first preferred stock order dated May 26, 1955 (R. 518-536) is not reported. No report accompanied the second preferred stock order of the full Commission dated June 22, 1955, which denied reconsideration and made the first preferred stock order effective forthwith (R. 554).

Jurisdiction.

Suit was brought under 28 U. S. C. §§1336 and 2321-2325 (the Urgent Deficiencies Act). The final judgment below was entered on December 23, 1955 (R. 555-557); motions for a new trial and for reargument were denied on January 27, 1956 (R. 675-680); and the appellants filed their notice of appeal on February 23, 1956 (R. 24-30). Their statement as to jurisdiction was filed on May 7, 1956 and probable jurisdiction was noted on October 8, 1956. The jurisdiction of this Court rests on 28 U. S. C. §§1253 and 2101(b).

Statutes Involved.

The statutes involved are: the Interstate Commerce Act, 24 Stat. 379 (1887) as amended, 49 U. S. C. §§1(3)(b), 5(2), 5(3), 5(4), 5(7), 5(8), 5(9), 12(1), 15(2), 16(6), 16(7), 16(12), 20a(2), 20(a)6 and 20a(11); the Investment Company Act of 1940, 54 Stat. 789 (1940) as amended, §§3(c)9, 7(a), 8(f), 40(a), 42(a), 42(e) and 44, 15 U. S. C. §§80a-3(c)9, 7(a), 8(f), 39(a), 41(a), 41(e) and 43; and the Urgent Deficiencies Act, 38 Stat. 219 (1913) as amended, 28 U. S. C. §§1336 and 2321-2325.

These sections are set forth, in full or in relevant part, in Appendix A, *infra* pp. i-xv.

Questions Presented.

1. Did the District Court err:

(a) in holding that the appellees gained standing to review[1] the status orders when and because the ICC made the preferred stock orders;

(b) in holding that the appellees have standing to review the preferred stock orders, and also the status orders, on the basis of their claimed independent rights under the Investment Company Act, as common stockholders of Alleghany; and

(c) in asserting and exercising the power, in this action under the Urgent Deficiencies Act, to adjudicate and enjoin a claimed violation of the Investment Company Act?

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[1] "Standing to review" is used in this brief as the convenient equivalent of "standing to sue for review". Similarly, "reviewable by" means "reviewable in an action by."

2. Did the District Court err in holding:

(a) that an ICC order dated June 5, 1945, which assumed jurisdiction over Alleghany pursuant to §5(3)[2] upon the basis of Alleghany's then control of Chesapeake & Ohio Railway Company, automatically lost its efficacy when Alleghany divested itself of such control on January 19, 1954, and that the ICC automatically lost jurisdiction over Alleghany on January 19, 1954, although by its terms said order remained in full force and effect unless and until the ICC ordered otherwise, and although the ICC did not order otherwise until it made the superseding status orders;

(b) that an order of the Securities and Exchange Commission (SEC) dated October 4, 1945, which terminated Alleghany's registration under the Investment Company Act upon the basis of its regulation under the Interstate Commerce Act pursuant to said ICC order dated June 5, 1945, also automatically lost its efficacy when Alleghany divested itself of such control on January 19, 1954, although said SEC order expressly provided for its revocation, suspension or modification after appropriate notice and opportunity for hearing, and although the SEC has not held any hearing and has not made any order respecting such revocation, suspension or modification; and

(c) that Alleghany thus automatically became an unregistered investment company on January 19, 1954, thereafter and still subject to the provisions of the Investment Company Act relating to an unregistered investment company?

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[2] Section references in this brief not otherwise identified are to sections of the Interstate Commerce Act and the similarly numbered sections of Title 28, U. S. C.

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